THE RETURN ON ESTATES OF NON-RESIDENT DECEDENTS.

I

A QUESTION of much practical importance in the administration of the Federal Estate Tax Law, involving considerable sums and opening the whole matter of the protection of deposits in banks, either of money or securities, by persons residing abroad, is the return on the estates of non-resident decedents.

The Estate Tax was originally established by Act of September 8, 1916, and amended by the War Revenue Act of 1917. The Revenue Act of 1918 repealed these statutes, and the whole matter is now regulated by the new law.[1] The tax is imposed upon the transfer of every net estate of a decedent dying after the date of passage of the original enactment, whether such decedent was a resident or non-resident of the United States.

The liability begins with a tax of 1% on net estates, not in excess of $50,000. On estates exceeding $50,000, but not exceeding $150,000, a tax of 2% is levied, and so on up to 25% of the amount by which the net estate exceeds $10,000,000. The net estate upon which the tax is levied is determined by computing the gross estate, *i. e.*, the total assets, and subtracting therefrom those charges against the estate, and deductions for which the law provides. This tax differs from State inheritance taxes in that it is not a tax upon the individual distributee, legacy or share, but is a tax upon the transfer of the total estate.[2] It is consequently not a property tax in the strictly legal sense, but is an excise tax.

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[1] 40 Stat. 1096; Comp. Stat. I 1919 Supp. 1367.

[2] Treasury Regulations 37, Relating to Estate Tax. Plunkett *v.* Old Colony Trust Company, 233 Mass. 471, 124 N. E. 265; *In* re Hamlin, 226 N. Y. 407, 124 N. E. 4; People *v.* Northern Trust Co., 289 Ill. 475, 124 N. E. 662.

In the case of non-residents, the law provides for a tax only upon that portion of the net estate situate in the United States. It provides further that the tax is paid upon the *net* estate only if the executor includes in the return a description of that part of the estate of the non-resident decedent not situate in the United States. As the tax, however, is levied only on that part of the estate situate in the United States, it is provided that if a complete return is made, it is levied on the net estate determined by the deduction of a proportion of the charges against the entire estate relative to the amount situate in the United States.[3] If such return is not made, the tax is levied upon the gross estate. It is with this phase of the law that the present paper deals.

The attitude of the Government regarding the duties of a representative of the estate of a non-resident, as propounded by the Treasury Department in correspondence, is substantially as follows: While the personal representative of the estate of a non-resident decedent is only required to file a return of that part of the gross estate of the decedent situated in the United States, and may elect whether or not he will file a return of the entire gross estate of a decedent, and thus entitle the estate to the deductions allowed by the statute, he is nevertheless required, at such times and in such manner as may be required by regulations made pursuant to law, to file a return setting forth such supplemental data, including an inventory of the total estate, as may be necessary to establish the correct tax, and under the section of the law requiring such supplemental data a power to require a return on foreign property may be based. This finding is based upon Sections 403 (b) and 404 of the Revenue Act of 1918.[4]

[3] Act of Feb. 24, 1919, c. 18, § 403; Regulations 37, Arts. 59, 60. The law draws a distinction between the treatment of residents and non-residents, on the basis of domicil. Unlike the Income Tax, there is no assertion of a jurisdiction to tax citizens abroad merely on the ground of citizenship. The law gives the estate of resident decedents a specific exemption of $50,000 not accorded to that of non-resident decedents.

[4] These sections are reproductions of Sections 203 and 205 of the Act of Sept. 8, 1916.

Section 403 (b) 3, in setting forth the deductions which may be availed of in case of a non-resident, says in part as follows:[5]

> "No deduction shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under Section 404 the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States."

Section 404 provides in part as follows:

> "The executor shall also at such times and in such manner as may be required by regulations made pursuant to law file with the collector a return under oath in duplicate setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situate in the United States; (b) the deductions allowed under Section 403; (c) the value of the net estate of the decedent as defined under Section 403; (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax."

These are the only sections of the law in which the question of the obligation of an executor or representative of a non-resident decedent to report the total gross estate wherever situate is raised. The only obligation upon the personal representative imposed by the express provision of the law is that he file a return of that portion of the estate situate in the United States. The express language of the statute does not contemplate a report upon property situate without the United States.

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[5] The terms executor, administrator and personal representative are used in the statute and regulations issued thereunder. The statute states (Sec. 400): "The term executor means the executor or administrator of the decedent, or if there is no executor or administrator, any person who takes possession of any property of the decedent." Thus, under this definition, a bank at which bonds were deposited for safekeeping and collection, would be an executor for the purposes of this statute. Of course, the use of the term does not *eo ipso* give to such an agency any duties or rights beyond those prescribed in the statute.

As to the British practice, cf. 13 HALSBURY, LAWS OF ENGLAND, 214, where substantially the same definition is followed.

It is primarily in order to establish the deductions allowed under the law that a report on property situate without the United States would, in any event, be required. *Prima facie,* therefore, if the representative in the United States of the estate of a non-resident decedent should indicate his willingness to waive the advantages of such deductions, a report of the total gross estate wherever situate would not be necessary.

In view of the fact that an obligation is nowhere expressly imposed upon executors or representatives of decedents to report the gross estate of the decedent situate without the United States, the contention of the Treasury Department rests entirely upon a construction of the statute and is based more particularly on an inference from the words "supplemental data" of Section 404, quoted above.

The Treasury has urged that an inventory of the total estate is part of the supplemental data which is necessary to establish the correct tax; and that the inventory being a document required by law to be filed by the personal representative of the estate, showing the amount and character of the entire estate as evidence to establish the correct tax due, its value is manifest. The further contention is made that legally such inventory is covered by the term "such supplemental data". Finally, as a means of establishing its right upon an even broader foundation, it resorts to Section 410 of the Revenue Act, which provides:

> "Whoever fails to comply with any duty imposed upon him by Section 404, or having in his possession or control any record, file or paper containing, or supposed to contain any information concerning the estate of the decedent, or having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request of the Commissioner, or any Collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in performance of his duty under this title, shall be liable to a penalty not exceeding $500 to be recovered with costs of suit in civil action in the name of the United States."

This is interpreted to mean that Congress confers upon the

Commissioner of Internal Revenue the widest discretion in determining what data may be necessary to establish the correct tax due upon the estate of a decedent, and that he is authorized to require the *production of any paper, any record, file or paper containing or supposed to contain any information concerning the estate of the decedent.* It is pointed out that both under the Revenue Act of September 8, 1916, as amended, and in the Act of 1918, certain kinds of personalty, *i. e.*, stock in a domestic corporation owned and held by non-resident decedents, is deemed to be within the United States for the purpose of taxation. The necessity for such discretion, it argues, is manifest and should not be limited by any narrow construction of the statutes.

It may be considered, however, that the construction put upon Section 404 and Section 410 is not contemplated by Congress in the enactment of this law. It is a fundamental rule that laws of taxation are to be construed narrowly, and the latitude claimed by the Government in this instance is not supported by the courts in analogous cases.[6]

A careful consideration of the statute develops that Subdivision a of Section 404 states specifically that the obligation which is laid upon a personal representative of an estate is to make a return setting forth the value of the gross estate of the decedent at the time of his death, or, "in the case of the non-resident, *that part of the gross estate situate in the United States.*"

It is not reasonable to suppose that Congress, by specifically limiting the duty of the personal representative in Subdivision a of Section 404, would in Subdivision d, by placing the requirement of furnishing supplemental data, completely void the

[6] In 1917 the Supreme Court of the United States, in the case of Gould *v.* Gould, 245 U. S. 151, held as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend the import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are to be construed most strongly against the Government and in favor of the citizens."

Cf. also: United States *v.* Wigglesworth, 2 Story 239; American Net & Twine Co. *v.* Worthington, 141 U. S. 468; Benziger *v.* U. S., 192 U. S. 38; United States *v.* Watts, 1 Bond. 580.

meaning of Subdivision a. To take the words "supplemental data" from their context and to inject into them a meaning which the preceding paragraphs of the same section expressly deny, is not only contrary to a reasonable interpretation of the statute itself, but is, furthermore, a violation of the canons of statutory construction. It amounts to plucking a single sentence from its context and endowing it with a meaning apart from its true relation to the remainder of the same section.[7]

Nor does the Government's interpretation of Section 410 convey the true meaning of the statute. As was indicated above, the Government regards this section as conferring upon the Commissioner of Internal Revenue authorization to require the production of *any* record, file, or paper containing or supposed to contain any information concerning the estate of the decedent.

The statute, however, expressly limits this power to such records or papers which may be in the possession or control of a person *upon whom duties are imposed by Section* 404. In other words, in the case of non-residents, it is only as to those records which *may be in the possession of an executor or representative in the United States,* of a non-resident decedent, that this power is extended. Thus, where a will of a non-resident decedent is probated abroad, and a portion of the property is in the hands of a representative here, ancillary letters not being taken out in the United States, the Commissioner could require from the representative of the estate in the United States only such papers or information as are actually in the control of the latter.

Assuming, therefore, that the requirement of furnishing "supplemental data" is only as to the expressed duty of the personal representative, laid down in Sections 403 and 404, the question resolves itself into whether the requirement to furnish records or papers in the control of persons upon whom duties are imposed by Section 404, extends to the furnishing of an inventory of the total estate. It was pointed out above that the correct construction of Section 404 contemplates the return, in

[7] Kohlsaat *v.* Murphy, 96 U. S. 153; McKee *v.* U. S., 164 U. S. 287; Rice *v.* Minn. & N. W. R. Co., 1 Black 358; Bernier *v.* Bernier, 147 U. S. 242.

the case of a non-resident decedent, only of his gross estate which is situated in the United States. This being the limit of the duty imposed by Section 404, it is only as to those papers or records which have reference to this particular duty that Section 410 authorizes the Commissioner to require. Where the personal representative does not claim deductions, the conclusion seems unavoidable that he is not obliged to furnish any information beyond that relating to the gross estate situate within the United States.[8]

II

We have thus far considered only the construction and interpretation of the statute itself. There is some question, however, whether or not, apart from the construction of the statute, the Treasury Department can support its claim to require a return on property without the jurisdiction of the United States upon any legally sound theory. The only plausible ground which suggests itself is that the presence of certain property within the territorial limits of the United States would form the basis for a constructive jurisdiction over property abroad—at least to the extent of requiring a return thereon.[9] It is true that the rules of the Treasury Department do not announce such a proposition, but the fact that it holds that a duty is imposed upon representatives in the United States of non-resident decedents to secure a return, and that this duty is enforced by the infliction of a penalty for failure to make such a return, indicates that

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[8] The British law (Finance Act, 57 and 58 Victoria, c. 30, § 8 (3)) limits the liability of the personal representative for the payment of Estate Duty to the amount of the assets which he has received in this capacity or might but for his fault have received. When any person accountable for the duty delivers to the Commissioners a verified statement, to the best of his knowledge and belief, of all property passing, the Commissioners determine the duty in request of the property for which the applicant is accountable, and upon payment the applicant is thereupon discharged as to this property. Finance Act 1894, § 1162, amended by Finance Act 1907, 7 Edw. VII, c. 13, § 14.

[9] This is merely what the writer conceives to be the attitude of the Treasury, stated as a workable legal proposition. The Treasury, of course, states its position in terms of statutory sections.

something in the nature of a constructive jurisdiction for the purpose of securing these returns is supposed to exist.

Jurisdiction in its broadest sense is, of course, the sovereign authority to make, to determine and to execute laws.[10] These elements are all essential and indivisible parts of the authority and from a strictly objective viewpoint we cannot treat the correlative power to enforce or execute a right which exists in the abstract as a mere incident to the right. Failing the power to enforce the authority, the right itself must fail. In other words, a sovereignty which cannot execute its laws cannot in this respect claim to be exercising a right.

In dealing with the jurisdiction to tax, it appears that we are dealing with jurisdiction in this sense, and in this relation the fact that a power to enforce is a necessary requisite to the exercise of jurisdiction is borne out with peculiar force, because a tax which is not enforceable, however justifiable from a purely subjective point of view, as a reality is laughable. It is true that it is not necessary to have a direct and actual application of the sovereign power to objects strictly within the territorial limits of a country, and that the term jurisdiction can refer to the extension of this power by reason of the existence of some facts from which the law will infer the right. When this situation exists, we have a constructive jurisdiction—it is simply that the facts are of sufficient cogency to raise a presumption of jurisdiction.

Where a right to tax is asserted on the basis of a constructive jurisdiction, there must be either a person or property as the object of direct exercise of jurisdiction. Conditioned upon this fact, claim is then made to exercise the right to tax other ob-

[10] Wedding *v.* Meyler, 192 U. S. 573; Arnold *v.* Shields, 5 Dana 18. The term as it is used in connection with taxation is, of course, something different from the use in its narrow sense as to the right of a particular court to take cognizance of and determine a particular case. The discussions of jurisdiction to tax confine themselves generally to an examination of particular sorts of taxes and do not attempt to deduce any body of principles on this subject; nor do they indulge in much speculation as to the nature of the jurisdiction. Cf. COOLEY, TAXATION, 3rd. ed., pp. 22, 83. Beale, "Jurisdiction to Tax", 32 HARV. LAW REV. 587.

jects which are not the direct objects of the sovereign power. Thus, the establishment of a domicil will give the State a right to tax objects not within its territorial limits, simply because its jurisdiction over the person enables it to enforce its decrees.

In the present discussion the points at issue are two. First, whether the Treasury Department in its requirements for a return is really requiring the performance of an act so that we can speak of an exercise of jurisdiction, and secondly, whether, this being the case, the physical facts upon which a constructive jurisdiction must depend are really present, in the sense that there is the power to enforce the law in the event of a failure to comply with the demands of the Government.

It is true that the Treasury does not assert a jurisdiction to tax property abroad, but indicates that it requires merely a return on such property for the purpose of ascertaining the true tax; nevertheless, it is a question whether or not the mere requirement of a return is not itself an exercise of the taxing power, which is proper only within well defined jurisdictional limits and must be restricted thereto. This question depends in turn upon a determination of the legal nature of the return—whether it is a mere administrative detail or whether it is an essential part of the machinery of taxation. It is submitted that the requirement of a return is as much an exercise of the taxing power as the determination of the tax, or the actual collection, and that consequently it is proper only within the same bounds as any other incident of taxation.

The reasons for this are inherent in the nature of the law. From a purely abstract point of view the tax is upon the transfer, the taxability is measured by the amount of property, and the tax thus determined becomes a charge upon the property. Any property of a decedent subject to the jurisdiction of the United States is subject to the tax, but in the nature of things the tax does not automatically report itself or collect itself, nor is the duty of finding out and reporting the property primarily upon the Government.[11] It requires certain definite action on

[11] Act of Feb. 24, 1919, c. 18, § 405; R. S. § 3176; Regulations 37, Articles 78 and 89.

the part of individuals charged with property, or with knowledge of its whereabouts, before the amount of tax is ascertainable.

In other words, the right exists, but it is made actual only by definite acts on the part of individuals. The first act in the ascertainment of the property to be taxed is the filing of a return in some form by persons whom the law charges with this duty. It is a condition *sine qua non* to the levying of the tax. The importance of this duty is emphasized by the fact that the law imposes penalties for a failure to make a return or for an incorrect return.[12] It is true that as to enforcement of these penalties the statute is not mandatory upon the authorities,[13] but the fact that the exercise of the power is discretionary as to the Government does not affect the responsibility of the personal representative. Nor is the requirement of a return in the case of the present tax a mere regulation for the protection of the taxpayer, or an official convenience,[14] but is one upon which, as pointed out, the whole proceeding of collection depends. In this respect it must be clearly distinguished from the returns by assessors in the case of ordinary property returns. It is the first duty devolving upon the taxpayer, from which he is exempt as little as he is from the payment of the tax itself, once the right to the tax exists.[15] Both in the case of the Income Tax and Estate Tax, therefore, we find the duty of the taxpayer is a more complicated and extensive one than in the case of ordinary property taxes.

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[12] Act of Feb. 24, 1919, c. 18, § 410; R. S. § 3176.

[13] Bailey *v.* N. Y. C. R. Co., 89 U. S. 604. Cf. also R. S. §§ 3229, 5292, 5293.

[14] As is often the case in State property tax returns. 1 COOLEY, TAXATION, 3d. ed., p. 264.

[15] The Treasury rulings have by the interpretation of the word "executor" placed upon all persons, in whose hands propery may be, a primary obligation to report the tax, and resort to the return by collectors only as a final means of enforcement. Similar in the Income Tax Regulations is the obligation of return at the source of income. The fact that the Collectors of Internal Revenue exercise the right to make a return in the event of a failure to secure a return from any other source seems if anything to lend force to the view that the whole process of collection is dependent on the return.

If it is true then that in the requirement for a return the Government is exercising its power to tax as such, it would appear that an exercise of this power must be restricted to the proper jurisdictional limits. In other words, it can be effectively exercised only if jurisdiction can be obtained over the individual or the subject matter.

Certainly if an alien individual dies abroad, and his representative resides abroad, there is no jurisdiction over the latter—whom the law charges primarily with the duty of reporting the property. This is true irrespective of the fact that the law is valid as to any transfers of property about which the liability to tax by the United States is unquestioned, such as stock in a domestic corporation. It seems not illogical therefore to insist in the present case that if the power to tax is limited to subjects properly within the jurisdiction of the United States,[16] the return which goes to the very essence of the taxing power cannot be legally required of persons who are actually abroad.[17]

With the elimination of the personal representative abroad as a possible object of jurisdiction, we are led to inquire whether or not the presence of taxable property in the United States itself gives the right to require a return on property without the territorial limits of this country; and how far the right, if it exists, can be enforced on the known property in the United States, or upon the agents in whose hands it is. There is no question as to the taxability of stock in domestic corporations, irrespective of the presence in the United States of the shares, or of bonds which are physically present in the United States.[18] To the extent that the securities upon which the tax is charged are in either of these ways within the jurisdiction of the United

[16] 1 COOLEY, TAXATION, 3rd. ed., p. 121; State Tax on Foreign-held Bonds, 15 Wall. 300.

[17] That the making of the return is an integral part of the whole procedure of taxation seems to be borne out by the attitude of the Supreme Court in Labette County *v.* Moulton, 112 U. S. 217, 224 and People *v.* Weaver, 100 U. S. 539, treating the various steps of the whole process as non-separable and interdependent.

[18] Blackstone *v.* Miller, 188 U. S. 189; State Board of Assessors *v.* Comptoir National d'Escompte, 191 U. S. 388; Iowa *v.* Slimmer, 248 U. S. 115; De Ganay *v.* Lederer, 250 U. S. 376.

States, the taxation is within the proper exercise of sovereignty. It is the difficulty of determining the presence of taxable property that has brought about the attempt to secure the return through the intermediacy of agents in the United States.

The Treasury Department has argued that for the purposes of a practical administration the requirement for a return on property without the United States cannot be limited to such items as may *prima facie* appear to be taxable by the United States, for this would leave to the determination of foreign executors and administrators the question of whether or not the property was taxable. The return must, therefore, be on the whole property, or, in the view of the Treasury, the object of this document is defeated. But to this it may be answered, that (1) the property in the United States can be charged only with the tax due on it, and (2) that the duty of the representative of the United States is limited in all respects to the property within his control.

We have seen that the tax is regarded as a charge upon the whole estate. This term—charge upon the whole estate—appears, however, to be inclusive and not restrictive, *i. e.*, that it operates as to every part in particular, and that in the absence of any specific exemption, all parts and items of the estate are equally subject to tax. The law itself gives some countenance to this view that the charge is against portions of the estate in the hands of persons liable. It could never be claimed that where only a portion of the total estate was actually in the United States and where it was impossible to secure a return on other property, a hypothetical tax as to unknown property could be charged upon that portion of the estate within the United States. In other words, if there is property in the United States, the known tax is only as to that property and a charge upon that property alone. In this relation, Section 409 of the law provides in part as follows:

> "If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a fair consideration in money or money's worth) or (b) if in-

surance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a *bona fide* purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a *bona fide* purchaser for a fair consideration in money or money's worth."

This has been interpreted [19] to mean that the amounts of the lien and the personal liability of the transferee, trustee and insurance beneficiary are limited to the amount of the tax upon the transfer of the particular property in the possession of the person liable. There is no attempt to create a greater liability in the transferee or trustee beyond these limits.

A further means by which the collection of the tax is enforced, of some importance in relation to the present question of how the tax operates as a charge on property, is the enforcement of the lien upon the estate. Section 409 relating to the lien is as follows:

"That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed."

One is struck by a certain vagueness in the language of this section and by the latitude which is left to construction. Where

[19] Regulations 37, Article 101.

the property is already situate in the United States, the difficulties are not great. The lien, according to the Treasury, attaches to every part of the estate irrespective of the fact whether or not the property comes under control or custody of the executor, and is destroyed only by the payment of the entire tax. The lien attaching to each part of the estate, in the case of estates of non-resident decedents, presumably attaches only to the portion which is taxable, *i. e.*, the property in the United States. Assuming the case where return on such property is made by a resident representative of a non-resident decedent, but the inventory of the total estate is not furnished by reason of the inability of such representative to secure the same, the question arises whether the lien can be enforced even to the extent of refusing the release to the foreign executor of the specific property in the United States reported as a means of enforcing the return on the total estate.

The statute says nothing with reference to the time when the lien attaches. In the absence, therefore, of an express provision in the statute, or some language from which a time can be inferred, it is correct to say that the lien will attach only after the tax is ascertained.[20] The Government contends, however, that the tax cannot be ascertained until a complete return on the total estate is made. The *impasse* is, therefore, reached that as the tax cannot be ascertained the lien cannot attach. Admitting, however, that the lien may attach to the property even before the tax is ascertained, it appears equitable that if the deductions permitted by the statutes are waived, and tender is made of the tax upon the property in the hands of the representatives of the United States, there is no enforceable lien, for the tax ascertained would be only as to the particular property.

The interpretation of the lien provisions of the Estate Tax by the Government seems to support the contention that where the

[20] It is clear that where the statute does not specifically provide a time, a lien attaches generally after assessment of the tax. Lyon *v.* Alley, 130 U. S. 177; Hefner *v.* Northwestern Life Ins. Co., 123 U. S. 747. Cf. also Heine *v.* Levee Commissioners, 19 Wall. 655. This rule seems to make it necessary that the property on which the tax is charged as well as the amount of the tax shall be definitely ascertained.

words "charge upon the gross estate" are used, the phrase is employed in the sense that the charge is after all upon the various items in particular. This would mean that the tax would be ascertained as to the particular items, and that payment would be made of the tax thus ascertained. This solution of the question is not impracticable, as the law itself makes provision for the payment on property which, subsequent to the payment of the original tax, may be found. Indeed it seems more impracticable where property is reported by various personal representatives of decedents that a single representative or administrator should be made liable for the full amount of the tax on the property in his hands. The statute has made provision for this in reference to the lien by permitting the release of the lien upon particular items of property. To sum up, then, it is clear that the property is charged only with the tax upon it, and that the lien, if it is enforceable, is only for the amount of this particular item, and on this property alone.[20a]

Thus far has been outlined what are conceived to be the limits of the taxing jurisdiction as to the property in the United States. There remains yet to consider the extent to which the resident representative is liable.

The penal provisions of the law as interpreted by the Treasury seek to place upon the resident representative a penalty for the failure of a representative abroad to supply a return on property of which he alone has knowledge, but the statute places in the hands of the resident representative no means of enforcing his right against the non-resident executor.

We have already seen that a personal liability can in no event attach to the foreign executor. This doctrine has been emphasized in cases where States have sought to hold non-residents personally liable for taxes, and the Supreme Court of the United

[20a] A further consideration in explanation of the phrase "charge upon the gross estate" is that the words are so used to distinguish the operation of this tax from the method in which the Inheritance Tax operates, *i. e.*, that it is to be taken as imposed upon the "estates of decedents" as distinguished from a tax on legatees or devisees. The State decisions cited *supra* seem to support this view. *Contra*, Fuller *v.* Gale, 78 N. H. 544, 103 Atl. 308.

States has repeatedly denied the right of the State to take such action.[21] What was sought to be done in these cases was to

[21] Dewey *v.* Des Moines, 173 U. S. 193, where the court stated:

"A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one as in the case of a more formal judgment.

"The jurisdiction to tax exists only in regard to persons and property or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question."

Cf. also State Tax on Foreign-held Bonds, 15 Wall. 300; New York *v.* McLean, 170 N. Y. 374; Pendleton *v.* Com., 110 Va. 229.

In this connection, the language of Mr. Justice Holmes in the case of Wallace *v.* Hines, 253 U. S. 66, should be regarded:

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State."

The problem at issue in the Wallace case was one essentially different from that involved in the present discussion. In the present case we are not dealing with property part of an "organic system", to determine the value of which property the State may look beyond its borders. In levying the Estate Tax, if we have specific property within the United States, the tax falls upon it irrespective of the existence of outlying property except in so far as information as to the extent and whereabouts may operate by the deduction of relative charges as a reduction in the amount of the tax. Here, moreover, the return on decedent's property within the United States fixes its value and the return on outlying property is not necessary to the ascertainment of the *value of the property* within the United States. If the assumption is correct that the tax in any event falls as a charge on each item of the estate upon ascertainment of its existence, the view that here we are dealing only with an ascertainment of existence of property and not

make the property the basis of a constructive jurisdiction over the non-resident, and the repudiation of this doctrine seems to enforce the view here presented that in no event can a penalty be visited on a mere agent which cannot legally be imposed on the non-resident principal.

The States themselves have recognized this principle in the enforcement of the inheritance taxes.[22] It is true that the nature of the tax is different in this case, the tax being laid upon the property, the particular legacy, devise or distributive share; yet the State decisions have limited the liability of executors and administrators for the tax under these laws solely to the amounts which come into the hands of such representatives, and do not permit the administrator to be charged for the tax on property which never comes into his hands. For our purposes, the question of personal liability is the only one involved in this analogy, and the analogy seems a sound one. The interest of

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of its value is given support. It is very questionable whether cases involving questions such as that in Wallace *v.* Hines have any bearing whatever on the present problem, the whole basis of jurisdiction being different.

[22] Although the nature and operation of the State inheritance taxes is essentially different, the tax being there one upon the individual distributees, nevertheless the duties of personal representatives are in some respects analogous to those involved in the present discussion. The Illinois Inheritance Tax Law provides that any trustee having any charge or trust in legacy or other property subject to distribution or tax shall deduct the amount of the tax therefrom and that executors, administrators and trustees shall be liable for the payment of taxes and interest. It was held in People *v.* Union Trust Co., 255 Ill. 168, 99 N. E. 377, that an executor, administrator or trustee could not retain out of the property coming into his hands as a gross amount the entire sum of inheritance taxes to be imposed. Hence where administration was had in a foreign State and part of the legacies paid, and then a portion of the property transferred to the Illinois personal representative, the taxes were collectable from the latter only on the property transferred to him. Of course, the tax here is only on the beneficial interest received, and hence this of itself operated as a check on the taxing power. The court here said if there was any Illinois tax on other legacies, it was collectable from the foreign beneficiaries. The liability to tax attaches primarily to the property in the State, even if the beneficiaries are abroad. *Re* Ramsdell, 190 N. Y. 492; Swift *v.* Barney, 211 Mass. 134. Cf. also Goodrich *v.* Rochester, etc., Co., 160 N. Y. Supp. 454, on attempt to fix a liability on a foreign executor.

the representative, be he a mere agent or one who is clothed with the rights and duties of an executor or administrator, is at all events limited to the property which is in his hands, and to the scope of his authority or agency. Once he has fulfilled his duties in this respect, a personal liability cannot be exacted in reference to other matters over which he has no control.

Although the Estate Tax has been in operation for a number of years, there has been no adjudication of the many important questions involved in the construction of the law. Up to the present time, consequently, banks and other representatives of non-resident decedents have been proceeding more or less in the dark, and the construction of important rights has been left in the hands of the administrative officials. It has been suggested that not the least important of these questions has been that of the protection of deposits by non-residents. The latter, already forewarned by the burdens placed upon them by the Income Tax Law, have in many instances simply withdrawn their deposits from the United States. The economic consequences of a general action in this direction would undoubtedly be serious. It is, therefore, well to consider whether the immediate gain in national revenue resulting from the policies heretofore pursued are of sufficient importance to counterbalance the resulting loss in another direction. It is not necessary to litigate to prevent such consequences, for a just interpretation of the existing law can be of equally beneficent effect.

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